Filed 7/10/17 P. v. Ermin CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VLADIMIR ERMIN, Defendant and Appellant.	H043777 (Santa Clara County Super. Ct. No. B1683779)

I. INTRODUCTION

Defendant Vladimir Ermin pleaded no contest to being an accessory. (Pen. Code, § 32.) He was placed on probation for three years with conditions that included the following: "Your computer and all other electronic devices, including but not limited to cellular telephones, laptops, computers, or notepads, shall be subject to forensic analysis search for information reasonably related to criminal activity." Defendant was also required to "consent to and provide all passwords necessary to access and search said electronic devices to Probation and law enforcement."

On appeal, defendant challenges the electronic devices search condition, claiming it is unconstitutionally overbroad, unconstitutionally vague, and invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). Defendant also contends the trial court improperly imposed a criminal justice administration fee of $259.50 (see Gov. Code, §§ 29950, 29550.1, & 29550.2), because the trial court did not determine whether that amount

exceeded the actual administrative costs of his booking process. For reasons that we will explain, we will affirm the order of probation.

II. BACKGROUND

On December 7, 2015, defendant was arrested. He was found to be in possession of marijuana, and he consented to a search of his cell phone. During the search of defendant's cell phone, a deputy found photographs and videos of "packaged plastic bags and plastic containers," similar to those found on defendant's person, along with several text messages indicating defendant was connected to sales of marijuana.

Defendant was charged with possession for sale of marijuana (Health & Saf. Code, § 11359; count 1) and transportation and distribution of marijuana (Health & Saf. Code, § 11360, subd. (a); count 2). Pursuant to a plea agreement, the prosecution amended the complaint, adding a charge of being an accessory (Pen. Code, § 32; count 3), and the trial court dismissed counts 1 and 2 after defendant pleaded no contest to count 3.

Prior to sentencing, the probation officer's report recommended the following probation condition: "The defendant's computer and all other electronic devices (including but not limited to cellular telephones, laptop computers or notepads) shall be subject to Forensic Analysis search." The probation officer's report also recommended defendant be ordered to pay a $259.50 criminal justice administration fee, payable to the County of Santa Clara. The probation report cited Government Code sections 29550, 29550.1, and 29550.2 as the basis for that fee.

At the sentencing hearing, defendant's trial counsel argued that the condition regarding electronic searches was "too broad" under *Lent* and would violate defendant's right to privacy. Defendant's trial counsel noted that "people's bank records, health records, personal information, and journal entries are now all being stored on cell phones as well as laptops and notepads."

The trial court agreed that the proposed condition "does read rather broadly" and suggested the condition could be modified to add the following clause: "for the purpose of discovering information reasonably related to criminal activity."

Defendant's trial counsel asked the trial court to further limit the scope of the condition to permit searches of defendant's cell phone only. In addition, defendant's trial counsel argued that permitting a "forensic analysis search" would give an officer access to the "entire device," including hard drives and personal information.

The prosecutor argued that the condition should not be restricted to cell phones only, noting that electronic communication is "easily transferable" between devices. The prosecutor also argued that forensic analysis was often the "only . . . way" for officers to get the information they need from an electronic device.

The trial court overruled the defense objection to the "forensic analysis" language and indicated the condition would read as follows: "The defendant's computer and all other electronic devices, including but not limited to cellular telephones, laptops, computers, or notepads, shall be subject to forensic analysis search for information reasonably related to criminal activity."

The probation officer requested that the trial court add an order that defendant provide all passwords necessary to access or search his electronic devices. Defendant's trial counsel objected "under the same reasoning." The trial court found the proposed additional condition "reasonable" and ordered defendant to "provide all passwords necessary to access or search said electronic devices."

The trial court then suspended imposition of sentence, placed defendant on formal probation for three years, and imposed various additional probation conditions. Finally, the trial court ordered defendant to pay various fees and fines, including a $259.50 criminal justice administration fee payable to the County of Santa Clara "under the Government Code."

III. DISCUSSION

A. Overbreadth

Defendant contends the electronic devices search condition is unconstitutionally overbroad because it infringes on his privacy interests and violates his Fourth Amendment rights. He contends that the trial court could have imposed a more narrowly tailored condition, i.e., one that permits searches only of his cell phone, and permits searches for only information "likely to yield evidence of drug use, other criminal activity or noncompliance with probation conditions."

We review the constitutionality of a probation condition de novo. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*).) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*Id.* at p. 890.)

Defendant asserts that his overbreadth claim is supported by the reasoning of *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473] (*Riley*), in which the United States Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Id.*, 134 S.Ct. at p. 2493.) In so holding, the court explained that modern cell phones, which may have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id.* at pp. 2488-2489.) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Id.* at p. 2493.)

As *Riley* did not involve probation conditions, it is inapposite. Unlike the defendant in *Riley*, who at the time of the search had not been convicted of a crime and was still protected by the presumption of innocence, defendant is a probationer. "Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute

liberty to which every citizen is entitled." ' [Citations.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights* (2001) 534 U.S. 112, 119.)

This court rejected an overbreadth argument in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*), where the challenged probation condition required the defendant to " 'provide all passwords to any social media sites, including Facebook, Instagram and Mocospace and to submit those sites to search at any time without a warrant by any peace officer.' " (*Id.* at p. 1172.) The *Ebertwoski* defendant was a member of a criminal street gang who had promoted his gang on social media. This court rejected the defendant's claim that the probation condition was "not narrowly tailored to [its] purpose so as to limit [its] impact on his constitutional rights to privacy, speech, and association." (*Id.* at p. 1175.) This court explained that the state's interest in preventing the defendant from continuing to associate with gangs and participate in gang activities, which was served by the probation condition, outweighed the minimal invasion of his privacy. (*Ibid.*)

In *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*), a different panel of this court distinguished *Ebertowski* and found unconstitutionally overbroad a probation condition requiring the defendant's electronic devices to be " 'subject to forensic analysis search for material prohibited by law.' " (*Appleton, supra,* at p. 721.) In *Appleton,* the defendant was convicted of false imprisonment based on an incident that occurred about a year after he used a social media website to meet the minor victim. (*Id.* at p. 719-720.) The *Appleton* panel held that the electronic devices search condition was overbroad because it "would allow for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential for future criminality." (*Id.* at p. 727.) The *Appleton* panel concluded that "the state's interest here—monitoring whether defendant uses social media to contact minors for unlawful purposes—could be served through

narrower means," such as by imposing "the narrower condition approved in *Ebertowski*, whereby defendant must provide his social media accounts and passwords to his probation officer for monitoring." (*Ibid*., fn. omitted.)

Here, the search condition regarding defendant's electronic devices properly serves the state's interest in preventing defendant from using electronic devices to engage in criminal activity such as the sale of narcotics. Indeed, defendant recognizes that some intrusion on his privacy rights would be justified, but he asserts that a more narrowly tailored condition should have been imposed.

As noted above, defendant claims that the condition is overbroad because it permits searches of all his electronic devices and not just his cell phone. As the prosecutor noted below, electronic information is "easily transferable" between devices. By allowing the search of other electronic devices, the condition ensures that defendant is not engaging in narcotics sales by the use of any electronic device. If the condition were limited to cell phones, defendant could simply use another electronic device, such as a laptop or tablet, to engage in criminal activity, and the probation officer would not be able to effectively monitor defendant's probation.

Defendant also claims that the condition is overbroad because it permits searches for more than just information "likely to yield evidence of drug use, other criminal activity or noncompliance with probation conditions." However, the trial court did limit the scope of the condition to provide that defendant's electronic devices could only be searched for "information reasonably related to criminal activity." Thus, the condition is narrowly tailored to further the state's interest of preventing the defendant from using his electronic devices to conduct future criminal activity and it does not "allow for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential for future criminality." (Cf. *Appleton, supra,* 245 Cal.App.4th at p. 727.)

We conclude that the challenged probation condition is not overbroad.[1]

B. Vagueness

Defendant also claims the electronic devices search condition is unconstitutionally vague, because it does not clearly provide notice of what he is forbidden from doing and is not specific enough to inform a probation officer what to search for or how to conduct a search.

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions.' " (*Sheena K., supra,* 40 Cal.4th at p. 890.) Our examination of the challenged condition is "guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not admitting of 'mathematical certainty,' the language used must have ' "*reasonable* specificity." ' " (*Ibid.*) In sum, the probation condition must be " 'sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated.' " (*Ibid.*)

In *In re Malik J.* (2015) 240 Cal.App.4th 896, the appellate court considered whether a probation condition requiring the minor to " 'provide all passwords to any

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[1] The California Supreme Court has granted review in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923, which presents the question whether a probation condition requiring a minor to submit to warrantless searches of his "electronics including passwords" is overbroad. (*Id.* at p. 886.) Review has been granted in a number of other cases presenting similar issues, with briefing deferred. (See, e.g., *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210.)

electronic devices, including cell phones, computers or [notepads], within [the probationer's] custody or control' " was unconstitutionally vague or overbroad. (*Id.* at p. 900.) The minor argued that the phrase " 'any electronic devices' " could be interpreted to include Kindles, Playstations, iPods, the codes to his car, home security system, or even his ATM card. (*Id.* at p. 904.) However, the appellate court concluded that the imposed search condition was in response to the trial court's concern that the minor would use items such as his cell phone to coordinate with other offenders. Additionally, the minor had previously robbed people of their iPhones. (*Id.* at pp. 904-905.) Therefore, the appellate court concluded that it was reasonably clear that the condition was meant to encompass "similar electronic devices within [minor's] custody and control that might be stolen property, and not, as [minor] conjectures, to authorize a search of his Kindle to see what books he is reading or require him to turn over his ATM password." (*Id.* at p. 905.)

Here, defendant appears to be arguing that the condition should have been more specific as to what type of information could be "reasonably related to criminal activity." However, as noted above, the language used in a probation condition must only have " ' "*reasonable* specificity," ' " not " 'mathematical certainty.' " (*Sheena K., supra*, 40 Cal.4th at p. 890.) A probation condition is sufficiently specific " ' "if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources." ' " (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630.) The condition here explicitly permits a search of defendant's electronic devices for evidence that he is conducting narcotics sales or engaging in other criminal activity and thus implicitly does not permit a search for other purposes. The condition thus provides defendant with fair warning and prevents arbitrary searches of his electronic devices for information not reasonably related to criminal activity. In sum, the challenged condition is not unconstitutionally vague.

C. Reasonableness

Defendant claims that the electronic search condition is unreasonable under *Lent, supra,* 15 Cal.3d 481, because the condition is not related to his crime or the prevention of future criminality and forbids conduct that is not itself criminal. Again, defendant's challenge is primarily directed at the condition's application to "electronic devices" rather than just cell phones.

Under the test set forth in *Lent, supra,* 15 Cal.3d 481, a condition of probation will be held invalid if it " '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*Id.* at p. 486, fn. omitted.) "This test is conjunctive–all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long the condition is reasonably related to preventing future criminality." (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380.)

We disagree that the search condition is unreasonable under *Lent.* The condition requiring all of defendant's electronic devices to be subject to search is related to his future criminality. Since defendant had used an electronic device in connection with drug crimes, it was reasonable for the trial court to give the probation officer the ability to ensure that defendant was not violating his probation by arranging drug sales through any electronic devices—whether a cell phone, computer, or tablet. (Cf. *In re Erica R.* (2015) 240 Cal.App.4th 907, 913-915 [electronics search condition unreasonable where minor committed misdemeanor possession of Ecstasy; there was no indication that she was involved in sales of drugs or that she had ever used an electronic device].) Although the evidence showed defendant had used only a cell phone in connection with his underlying offenses, it was permissible for the trial court to impose a more "wide-ranging"

electronics search condition, "for conditions of probation aimed at rehabilitating the offender need not be so strictly tied to the offender's precise crime." (*People v. Moran* (2016) 1 Cal.5th 398, 404-405.) We conclude the trial court did not abuse its discretion by imposing the electronic devices search condition.

D. Booking Fee

Defendant contends that the $259.50 criminal justice administration fee was improperly imposed because the trial court did not determine the actual administrative costs incurred in booking him into jail. Because his trial counsel failed to object to the fee, he contends he received ineffective assistance of counsel. (See *People v. McCullough* (2013) 56 Cal.4th 589, 591 (*McCullough*) [failure to object to booking fee in the trial court results in forfeiture of a challenge to that fee on appeal].)

We first address defendant's claim that the record does not indicate which agency arrested defendant or the statute under which the criminal justice administration fee was imposed. As noted above, the probation officer cited Government Code sections 29550, 29550.1, and 29550.2 after noting that a "deputy" had been involved in defendant's arrest, and the probation officer recommended the criminal justice administration fee be paid to the County of Santa Clara. "Which [Government Code] section applies to a given defendant depends on which governmental entity has arrested a defendant before transporting him or her to a county jail." (*McCullough, supra,* 56 Cal.4th at p. 592.) The trial court did not cite a specific statute when imposing the criminal justice administration fee, but it ordered the fee payable to the County of Santa Clara. The probation officer's identification of a "deputy" as the arresting officer and the identification of the county as recommended payee suggests the arresting agency was the Santa Clara County Sheriff's Department and thus that the basis for the fee was Government Code section 29550, subdivision (c). That subdivision provides that "[t]he fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs." (Gov. Code, § 29550, subd. (c).)

Defendant asserts that there is no evidence that the criminal justice administration fee reflects the actual administrative costs of his booking and that his trial counsel could have no tactical reason for failing to object.

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.] When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569 (*Anderson*); see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*).) If the record "does not show the reasons for counsel's actions," the ineffective assistance claim is "more appropriately decided in a habeas corpus proceeding." (*People v. McDermott* (2002) 28 Cal.4th 946, 1002.)

"Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., [a reasonable probability] that, ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*Anderson, supra*, 25 Cal.4th at p. 569; see also *Strickland, supra,* 466 U.S. at p. 694.)

In *People v. Aguilar* (2015) 60 Cal.4th 862 (*Aguilar*), the defendant claimed that the imposition of a criminal justice administration fee violated due process "because the record contain[ed] neither evidence nor trial court findings as to the actual costs involved." (*Id.* at p. 869.) The California Supreme Court rejected the claim, finding that "the trial court correctly relied on the fee schedule set by the county board of supervisors based on actual cost data submitted by the county sheriff." (*Ibid*.)

Here, the record suggests that, as in *Aguilar,* the trial court relied on a fee schedule set by Santa Clara County when imposing the $259.50 criminal justice administration fee.

Not only did the probation officer recommend a $259.50 fee, but the preprinted clerk's minutes form lists $259.50 as one of the two possible "CJAF" (i.e., criminal justice administration fee) amounts; the other being $129.75, representing half of that amount, which is payable when a city is being billed for the costs of booking. (See Gov. Code, § 29550, subd. (a)(1).) On this record, a reasonable inference arises that the $259.50 fee was based on a preexisting fee schedule. (See *Aguilar*, *supra*, 60 Cal.4th at p. 869 ["Nothing before us suggests the trial court did not properly rely on the . . . fee schedule."].) Defendant's trial counsel may have decided that an objection would have been futile because the fee schedule adopted by Santa Clara County provided proof that $259.50 represented the actual cost of booking a defendant into jail.[2] Since there is a possible "satisfactory explanation" for his trial counsel's failure to object, defendant cannot prevail on his ineffective assistance claim. (See *Anderson*, *supra*, 25 Cal.4th at p. 569.)

IV. DISPOSITION

The order of probation is affirmed.

[2] Pursuant to Evidence Code sections 452, subdivisions (b) and (c), the Attorney General court has requested we take judicial notice of the 2010-2011 recommended budget for Santa Clara County and the Board of Supervisors resolution adopting the $259.50 booking fee in 2006. Defendant objects to both exhibits. As neither document is necessary to our analysis, we deny the request for judicial notice.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.